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ABSTRACT

The American tradition of sovereign immunity and the Eleventh Amendment of the United States Constitution have provided certain legal protection to government personnel, including leaders of public elementary, secondary, and post-secondary institutions, but the concept of governmental immunity may be difficult to understand as it applies to educators. Generally, governmental immunity has protected educators in four areas: discretionary or judicial function, mandatory function, passive misconduct, and when state interests outweighed individual rights. On the other hand, courts also have held public educators liable in cases that involved: private function (proprietary), ministerial function (mandatory acts), optional or permissible function, creation or maintenance of nuisance resulting in injury or death, active, positive or willful and intentional wrong, judicial waiver, legislative waiver, judicial appearance, state participation in federally regulated areas, Fourteenth Amendment violation, and Civil Rights Act of 1981 violation. There are basically two reasons supporting a rationale for governmental immunity as applied to public education: the theory of sovereignty and the concern for public policy. As instruments of the state and local governments public education and its officials have received sovereign and Eleventh Amendment immunity. However, when educators have looked to the doctrine of immunity as protection, they have found what could be expected from a rusty feudal shield in a modern war. An individual feels more secure while standing behind it, but when the blast is over, the shield has offered no real protection. (Thirty-nine references are attached.) (RAE)

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Governmental Immunity for Public Education: A Shield of Legal Protection

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Abstract: The American tradition of sovereign immunity and the Eleventh Amendment of the United States Constitution have provided certain legal protection to government personnel, including leaders of public elementary, secondary, and post-secondary institutions. This paper explains the concept of governmental immunity, as it has applied to public education (private institutions have not been so guarded). Generally, governmental immunity has protected educators in four areas: discretionary or judicial function, mandatory function, passive misconduct, and when state interests outweighed individual rights.

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There must be certain aspects of law about which one can find general consensus, long term consistent development, and homogeneous agreement regarding philosophical need. The concept of governmental immunity is not, however, such an area of law. The concept of governmental immunity is confusing, complex, and inconsistent. Sovereign immunity came from feudal European origins, as a means of protecting government from suit. To educators in public institutions, governmental immunity has offered a shield of protection; to an individual injured by a governmental entity, immunity has stood as a bar against recovery. By examining the origins and erosion of governmental immunity, the educator can better understand how immunity may be applied in the context of public education.

Although the Eleventh Amendment of the United States Constitution clearly serves as the foundation of sovereign immunity, the exact nature of governmental immunity may be difficult to understand, particularly as it has been applied to educators. Immunity has been called the "cause of manifest injustice (Freitag, 1977, p. 625) and an "archaic doctrine" (Moreland, 1983, p. 236). Perhaps perspective on the issue depend upon which side one stands. To public educators and institutions and of higher education found to have governmental immunity, immunity has provided

defense in times of challenged decisions; to an individual injured, however, immunity had made suit against public entities difficult.

Sovereign immunity is a concept from the distant past that protects the state, and therefore safeguards state institutions such as public colleges and universities, their faculty and administrators. By way of summary:

> No suit, whether at law or in equity, is maintainable against the state either in its own courts or in the courts of a sister state, by its own citizens, by the citizens of another state, or by the citizens or subjects of a foreign state, unless the state's immunity from suit without its consent is absolute and unqualified, and a constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. (American Jurisprudence, 1976, p. 291)

Governmental immunity is not as clear-cut as this quote might lead one to believe, however, because sovereign immunity immediately creates a conflict between state and individual rights (Freitag, p. 625). Regarding educators in public institutions, governmental immunity should provide some shelter against suit to the extent that a teacher or administrator is an instrument of the government. In some regards, the question is one of jurisdiction because the issues involved will determine which courts will hear a

case. The Eleventh Amendment does not specifically prohibit citizens from suing their own states, a fact which has allowed for successful suits against educators when jurisdiction falls outside of federal courts.

When one examines the trends in state courts over recent years, the trend seems to be away from immunity for educators. Although courts generally protect police and firefighters, for example, they have been more inclined to disregard such protection for administrators and teachers. In federal courts, where there are issues of freedom of speech or due process violations at issue, the educator appears to have more support. Over the years, escape devices have developed that have eroded the scope of governmental immunity. The purpose of this paper is to examine the development and trends of governmental immunity--as interpreted by federal courts--as a base of protection for administrators and faculty in public education.

Origins

There are two sources to the concept of sovereign immunity: common or court made law and the U.S. Constitution. The foundation of immunity which is "rooted in the ancient common law, was originally based on the monarchical, semireligious tenet that 'the King can do no wrong'" (American Jurisprudence, 1974, p. 491). This

judicially created tenet was formally ratified by the legislature and the people of the United States in their adoption of the Eleventh Amendment to the U.S. Constitution. Article III of the Constitution states: "[t]he Judicial Power [of the United States] shall extend...to Controversies...between a State and Citizens of Another State...." In 1798, this principle was modified to exclude suits against the government by adoption of the Eleventh Amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State."

The concept of sovereign immunity came from the medieval idea that "the King can do no wrong." The framers of the U.S. Constitution felt that the common law doctrine of immunity would not be affected by the language of the Constitution. This sentiment is clear from public statements made by Alexander Hamilton, James Madison, and John Marshall (Callahan, 1976, p. 103). In 1793, however, the plaintiff argued that Article III allowed for suits by an individual against the state in Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). Contrary to expectations of the Constitutional drafters, the Supreme Court permitted an individual to sue the state of Georgia. The Court seemed concerned about states taking actions contrary to federal or

individual rights. The Court gave several examples of unacceptable state actions when it said: "these are expressly prohibited by the Constitution; and thus is announced to the world the probability, but certainly the apprehension, that States may injure individuals in their property, their liberty, and their lives; may oppress sister States; and may act in derogation of the general sovereignty." The Court went on to explain that such acts must be controlled: "Government itself would be useless, if a pleasure to obey or transpress with impunity should be substituted in the place of a sanction to its laws." States will "submit to the supreme Judiciary of the United States," although the federal government cannot be sued. The legislature responded within two days of the decision by initiating the Eleventh Amendment to the Constitution. The amendment was ratified in 1798, primarily due to concern over Revolutionary War debts (Callahan, 1976, p. 105).

The question of immunity from suit by a member of one's own state was brought before the U.S. Supreme Court in Hans v. Louisiana, 134 U.S. 1 (1890). In the cases that followed, the courts continued to struggle with the application of the sovereign immunity doctrine. As early as 1900, this effort began to focus on the apparent conflict between the Eleventh Amendment immunity language and the Fourteenth Amendment's safeguard of individual rights. Ex Parte Young, 209 U.S. 123, (1908) was a case involving the

attorney general of Minnesota (Young), who violated the Fourteenth Amendment in conducting his official duties. The state legislature made an unconstitutional act, and the Attorney General tried to enforce it. The Court recognized that Eleventh Amendment immunity allows "acts, and legislation which flagrantly violates the provisions of the Fourteenth Amendment...for all practical purposes." Callahan interpreted the case in this way: "The result of Young is that action by a state official may be state action for fourteenth amendment purposes, yet the same act is not deemed state action for eleventh amendment purposes" (Callahan, p. 106). In addition, based on Young, state officers may be sued as individuals (Freitag, p. 632). Further, a more recent Supreme Court agreed with an important exception to immunity for officials in Pennhurst State School v. Halderman, when the Court said that "a suit challenging the federal constitutionality of a state official's action is not one against the state," 104 S. Ct. 900 (1984). The extent to which a government employee is acting on behalf of the government is one issue in such suits. Obviously, most educators are far removed from government action in their day to day work. Thus the concept that "the King can do no wrong," is not the same as "the Educator can do no wrong." One might say that the recent mood of the country has been that public officials should be held accountable for their actions.

Another key case in the historical development of sovereign immunity was Edelman v. Jordan, 415 U.S. 651 (1974). Jordan brought a class action suit against former directors of the Illinois Department of Public Aid, alleging administration "in a manner inconsistent with various federal regulations and with the Fourteenth Amendment of the Constitution." Regarding the concept of immunity, the case reads:

> Respondent urges that since the various Illinois officials sued in the District Court failed to raise the Eleventh Amendment as a defense to the relief sought by respondent, petitioner is therefore barred from raising the Eleventh Amendment defense in the Court of Appeals or in this Court. The Court of Appeals apparently felt the defense was presented, and dealt with it on the merits. We approve of this resolution....For the foregoing reasons we decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld. The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

Again, a recent court used Young and Edelman as a basis for their reasoning on a similar issue in Pennhurst State School v. Halderman, 104 S. Ct. 900 (1984):

> In particular, Edelman held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of Young, such a suit would not be one against the State since the federal-law allegation would strip the state officer of his official authority. Nevertheless, retroactive relief was barred by the Eleventh Amendment.

Application to Public Education

Philosophical Reasoning for Immunity. There are basically two reasons supporting a rationale for governmental immunity as applied to higher education: the theory of sovereignty and the concept of public policy. In the first instance, the college or university is protected because of its sovereign character. The school functions on behalf of the state and the people. The principle has held up well in shielding public school systems in some cases, e.g. Thacker v. Pike County Board of Education, 193 SWd 409 (1946), Thurman v. Consolidated School District, 94 F. Supp. 616 (1950), Bingham v. Board of Education, 223 P2d 432

(1950), and Hummer v. School of Hartford City, 112 NE 2d 891 (1953). Thus, if functioning in a governmental capacity, the concept of immunity has potential to defend the educator. The areas in education where governmental functions are generally found, and thus protected, include several areas.

> The activities generally held to be governmental rather than proprietary in character include not only such closely school-connected functions as classwork, construction, repair, and maintenance of premises, and free transportation, but also operation of cafeterias and lunchrooms, school athletics, and use of premises for various nonschool purposes. (Korpela, 1975, , p. 738).

When functioning as a property owner in a proprietary capacity, however, educators have never been secure, as evidenced by Hopkins v. Clemson agricultural College of South Carolina, 221 U.S. 636 (1911). In this case, the court clearly held that in a proprietary function, a college is not shielded by immunity. Clemson damaged an individual's land by building a dike that diverted water onto his land. The court determined that immunity would not apply because the school was operating in a proprietary function, because the school "protecting the bottom land the College, for its own corporate purposes and advantages, constructed the dike. In so doing it was not acting in any

governmental capacity." In Riddoch v. State 123 P 458 (1912), however, the court found that regardless of whether or not the state is operating for gain, it is not immune or sovereign when operating a business enterprise.

Lack of funds is the underpinning of the public policy aspect of immunity. Because public institutions may be unable to pay damages, raise the money to pay damages, or divert designated funds to liability payment, they should arguably be protected from liability. Ernst v. West Covington 76 SW 1089 (1903) and Bragg v. Board of Public Instruction 36 S. 2d 222 (1948) furnish examples of the use of immunity to guard public funds. Applying the ability to pay reasoning to the process of balancing individual rights versus public interests tips the scales in favor of the public, so that the individual may suffer: "The welfare of the few must be sacrificed in the public interest...school funds and property may not be diverted to pay private damages, since such diversion may impair public education" (Korpela, 1975, p. 727). More recently, in Jagnandan v. Giles, the Court found that despite Mississippi's unconstitutional law barring resident alien students from in-state tuition, no relief was available because of Eleventh Amendment immunity, 538 F.2d 116 (1976). Other cases, however, have found just the opposite to be true. Because there are some similarities between educational institutions and business, some courts have reasoned that

because private colleges and universities are held responsible for their actions, so too public institutions should be accountable (Korpela, 1975, p. 727-8). In the Sixth Circuit, however, the court determined that a suit was not prohibited by the Eleventh Amendment if the county treasury could afford to pay damages, in Singer v. Mahoning County Board of Mental Retardation, 519 F 2d 748 (1975) (Callahan, 1976, p. 109).

State Control. The principle of state control was crucial to any immunity protection offered to public institutions. Because public education has functioned under the state, immunity often has been granted to public institutions and their staffs. Private institutions, in contrast, have sued and been sued, and are not helped by the Eleventh Amendment (American Jurisprudence, 1976, p. 302):

> Universities or colleges which are public or quasi-public corporations created and existing under state law and exercising a governmental function, or their governing boards, cannot generally, in the absence of express statutory authority therefor, be sued. But in some jurisdictions the liability of such institutions, or their governing boards, to suit, has been expressly declared by the legislature, and in other instances the right to hold and use property has been coupled with a provision that the college may sue

> and be sued, and plead and be impleaded, in its corporate name.

Thus, as a general rule when officers exercised a governmental function, they were shielded from liability for their actions (Mach & Kiser, 1975, p. 1354). This same protection is bestowed upon officers of the public institutions, insofar as appropriate within the Ex Parte Young and Edelman decisions (Mach & Kiser, 1975, p. 1354). Despite the recent trend toward erosion of this shelter, Berry and Hysni (1981) wrote:

> Contrary to popular belief, school boards and districts still have a good deal of governmental immunity in the operational aspects of schools....With respect to individual liability of school employees, as long as it can be shown that the activities were discretionary in nature, immunity will exist....the day-to-day supervisory activities of school employees appear to have the protection of governmental immunity. (p. 91)

In Jagnandan, the Fifth Circuit Court determined that exclusions to the Eleventh Amendment could be based on two factors: control and funding, in their decision in Hander v. San Jacinto Junior College, 519 F. 2d 273 (5th Cir. 1975). The principle of state control is certainly crucial to any immunity safeguard offered public colleges and universities. Many factors may now be considered in determining whether to apply the protection of the Eleventh

Amendment to cases brought against colleges and universities. Criteria may be applied--such as ability to pay, the school's organizational relationship to the government, legal ownership, the governmental function involved, the school's power to sue and be sued, power to contract--that help the Court to determine the role of immunity in each specific case.

Lack of Immunity Protection Against Individual Rights. Historically, the courts have been reluctant to hear cases concerning academic institutions of higher education. In the early 1970's, however, this trend began to change. By 1972, the Courts made clear that immunity did not apply where the issue involved violation by an educational institution of a professor's First or Fourteenth Amendment rights. In Perry v. Sinderman, 408 U.S. 593 (1972), a faculty member in the Texas System for several years was terminated after he became involved in public controversy by testifying to the state legislature against his institution. He argued that his First and Fourteenth Amendment rights were violated. Perry v. Sinderman is significant in that the question of immunity was never raised or discussed by the court. The most obvious conclusion one can draw is that the shield of immunity is not applicable where the central issue involves a violation of the First or Fourteenth Amendment.

In several cases involving state institutions of higher education, the principle of sovereign immunity did not shield those schools. In Shitner v. Davis, 410 F.2d 24 (1969), even though a state college was a state agency, it was not protected by the state's Eleventh Amendment immunity from suit in federal court by a citizen of the state, and neither were the college officials protected by the amendment. In this case, a dismissed female faculty member sued Central Washington State College and its President and Trustees under the Civil Rights Act. According to Judge Hamley: "While the College is a state agency, it is not protected by the state's Eleventh Amendment immunity....Individuals, sued in their capacity as trustees of a state agency, are not protected by the Eleventh Amendment any more than the agency itself is protected by that Amendment." Niether did a university's President and Board of Regents find immunity in Roth v. Board of Regents of State Colleges, 404 U.S. 909 (1972). Nor was a university shielded by immunity in Connelly v. University of Vermont and State Agricultural College, 244 F. Supp. 156 (1965) in a due process issue. Under a suit by a medical student, the Court determined that a state university was not immune from suit under the Eleventh Amendment, and the court ordered the institution to administer a fair and impartial hearing to consider the student's dismissal.

Monell v. Department of Social Services of the City of New York 436 U.S. 658 (1978) solidified the foundation for cases against public institutions under the Civil Rights Act 1871, when it made municipalities liable for rights violations under Section 1983. Traditionally, public college officials have been immune because the threat of liability would have a "chilling effect" that could adversely affect their decision-making. Under Monell public officials could be sued, and under Wood v. Strickland 420 U.S. 308 (1975) they have personal liability. A frequently cited point of concern in the Wood v. Strickland case is : "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." According to Lichtman:

> For Wood makes clear that school officials are answerable--in money damages-if they violate the constitutional rights of students in certain circumstances. The Court has thus provided a powerful inducement for compliance by school officials with the constitutional rights of students. (p. 592)

Anson emphasized the same point in another way:

> The third and most significant holding of Wood, like the Gross case was...The Court held that school board members were liable for damages caused by their violation of a constitutional right if they acted in bad faith or if they knew or should have known of the right so affected. In reaching this conclusion, the Court reasoned that the interest in encouraging vigorous and not an absolute immunity. (p. 577)

Whether an individual "knew or reasonably should have known" his or her acts violated the constitutional rights of a student, whether the action was taken with the "malicious intention" to cause such a deprivation of rights, or whether an action is one taken "in bad faith" are factual questions to be determined on a case by case basis. While one must not assume that these cases negate the Eleventh Amendment immunity for officials, they do imply a strict application where the suit is based on a violation of the Fourteenth Amendment or the Civil Rights Act 42 USC Section 1983.

Jurisdiction. Because the Eleventh Amendment's language is vague regarding suit by a citizen of his or her own state, one can see why there is some confusion over jurisdiction. Most observers, however, would think the Constitution seems to clearly bar suit of a state by a citizen of another state. Not so, anymore. In Nevada v. Hall, a California highway accident killed an employee of

the University of Nevada, driving a university car, on university business. Nevada was sued by the other injured parties, who were California residents. The California Supreme Court "Held that Nevada was amenable to suit in California courts and remanded the case for trial;"

> Until Nevada v. Hall a "suit against a state" had never been maintained "in the courts of a sister state"...The result of the Hall decision is that a state may no longer successfully claim immunity from suit in a court beyond its borders. Each state must be prepared to litigate in the courts of any state which chooses to assert jurisdiction over it. (Girifalco, 1980, pp. 57-8)

In Pennhurst State School v. Halderman, 104 S. Ct. (1984), the Supreme Court again considered the role of the Eleventh Amendment. The case involved a class action suit by mentally retarded citizens who alleged that the Pennhurst State School and Hospital conditions violated constitutional and statutory rights. The Supreme Court held: "The Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law," and it reversed and remanded the District Court's award of injunctive relief. So it appears that the Supreme Court may have replaced some of the power of the doctrine of immunity in this case.

Neither the state constitutions nor the Eleventh Amendment are able to prevent suits against individual officials in some situations. The immunity that may normally be offered to a college or university or one of the officials, for example, is sometimes waived so that it does not apply. Generally, that waiver may be at a federal, state, or institutional level. The various sources may waive immunity to protect an institution or to protect the individual bringing suit. For example, nineteen states have permitted suits against their governments, with the necessary procedures being under the control of the state legislatures. Recently, in Welch v. Texas Department of Highways and Public Transportation, 107 S. Ct. 2941 (1987) the Supreme Court indicated that such waivers could not be made lightly:

> (1) the Eleventh Amendment bars a citizen from suing his own state and prohibits admiralty suits against a state; (2) even assuming that Congress can abrogate the Eleventh Amendment...it must express its intent to do so in unmistakable language in the statute itself.

Thus, although a state may waive immunity, the Supreme Court has indicated that such waivers must be done carefully and clearly.

Conclusions

One must consider several factors to determine whether or not a public school is shielded under the Eleventh Amendment. The four situations in which institutional immunity has helped public educators include: (a) discretionary or judicial function, (b) mandatory function, (b) passive misconduct, and (d) the importance of state interests over individual rights. On the other hand, courts also have held public educators liable in cases that involved: (a) private function (proprietary), (b) ministerial function (mandatory acts), (c) optional or permissible function, (d) creation or maintenance of a nuisance resulting in injury or death, (d) active, positive or willful and intentional wrong, (e) judicial waiver, (f) legislative waiver, (g) judicial appearance, (h) state participation in federally regulated areas, (i) Fourteenth Amendment violation, and (j) Civil Rights Act or 1981 violation (Korpela, 1970, pp. 730-63).

There are basically two reasons supporting a rationale for governmental immunity as applied to public education: the theory of sovereignty and the concern for public policy. In the mid-1970s, the Fifth Circuit Court (Hander v. San Jacinto Junior College, 1975) determined that exclusions to the Eleventh Amendment could be based on control and funding, so that the outcome of a case depended on how much governmental function there was in the school and whether or not funds were available to pay damages (Callahan, 1976, p.

109). Under the theory of sovereignty, the public school functioned on behalf of the state and the people. The principle has held up well in shielding public school systems, in such cases as Thacker v. Pike County Board of Education, (1946), Thurman v. Consolidated School District (1950), Bingham v. Board of Education, (1950), Hummer v. School of Hartford City (1953), and others (Korpela, 1970, pp. 724-7). Such generalized protection, however, has eroded in recent years, as the courts placed more emphasis on the nature of the function involved: whether the institution functioned in its governmental or proprietary capacity. The former (governmental) has carried with it the protections of immunity; while the latter (proprietary) has not (Hopkins v. Clemson Agricultural College of South Carolina, 1911).

Lack of funds is the underpinning of the public policy aspect of immunity because the university may be unable to pay and public funds need protection. Ernst v. West Covington (1903), and Bragg v. Board of Public Instruction (1948) offer examples of immunity to save public funds. In another higher education case, although the court found a Mississippi law that barred resident alien students from in-state tuition unconstitutional, no relief was available because of the school's Eleventh Amendment immunity, (Jagnandan v. Giles, 1976). In the Sixth Circuit, however, the court determined that a suit was not prohibited by the

Eleventh Amendment if the county treasury could afford to pay damages (Singer v. Mahoning County Board of Mental Retardation, 1975).

In several cases involving state public educational institutions, the principle of immunity failed to aid schools. In Whitner v. Davis (1969), even though the college was a state agency, the state's Eleventh Amendment immunity could not shield the school from suit in federal court by a citizen of the state. In Roth v. Board of Regents of State Colleges (1972), a university President and Board of Regents found no protection when a faculty member's Fourteenth Amendment rights were violated. Nor did sovereign immunity help the college in Connelly v. University of Vermont and State Agricultural College (1965). Perhaps the most frightening decision for educators came under Wood v. Strickland (1975), which held that administrators had personal liability. The school official must have conducted himself or herself in good faith within the context of awareness of individual constitutional rights, or be found liable. The Supreme Court wanted to ensure compliance with federal regulations (Lichtman, 1975, p. 592).

As instruments of the state and local governments, sovereign and Eleventh Amendment immunity have afforded protections to public education and its officials. A general trend has been that the courts have abrogated or at

would be needed to fight the suit." Thus, when educators have looked to the doctrine of immunity as protection, they have found what could be expected from a rusty feudal shield in a modern war. One feels more secure while standing behind it, but when blast is over, the shield offered no real protection.

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